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2, C. A. Wright, Federal Practice and Procedure, Criminal § 557 at 525 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-645

JOSEPH BRIOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States
Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 8, 1973, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. THE "LARRISON RULE," APPLIED IN FEDERAL CASES CONCERNING RECANTED TESTIMONY, DENIES PETITIONER DUE PROCESS OF LAW SINCE IT IS IMPOSSIBLE FOR AN INNOCENT DEFENDANT TO SATISFY THE THIRD REQUIREMENT OF THE RULE.

The Government's entire case against the petitioner was based

upon testimony of one witness, Donald Meyer. During the course of the trial, Meyer testified that the petitioner had slapped him and threatened to put him in a wheel chair. It was the slapping of Meyer by the petitioner that gave rise to the indictment charging petitioner with a violation of 18 U.S.C. § 894.

In November of 1971, Meyer went to the office of his trial attorney, and admitted that his testimony at the trial had not been true. He fully recanted his testimony, and admitted that the petitioner had never struck him nor made any threats to him. These admissions were the basis for petitioner's motion for a new trial. An evidentiary hearing was held before the District Court on February 10, 1972. Meyer testified under oath on both direct and cross-examination that he had been mistaken in his trial testimony, and that it was not the petitioner who had hit or threatened him. In reaching a determination, the District Court applied the standard which was first set forth in *Larrison v. United States,* 24 F.2d 82, 87-88 (7th Cir. 1928). This rule has been adopted by most federal jurisdictions, 74 A.L.R. 759, and the standard has been termed by legal writers as the "Larrison Rule," 2, C. A. Wright, Federal Practice and Procedure, Criminal, § 557, at 525. In *Larrison, supra,* the Court held that a new trial should be granted on the basis of recanted testimony when:

> "(a) The Court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it, the jury might have reached a different conclusion.
>
> (c) That the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know its falsity until after the trial." (emphasis supplied by the court.)

The District Court, in applying this standard, found that points a and c were not met. The Court did not believe Meyer's recanted testimony and found that the petitioner could not have been surprised by Meyer's testimony at trial, since Meyer's accusations

had been disbelieved by petitioner at the time of trial. This ruling was sustained by the Tenth Circuit Court of Appeals.

This application of the "Larrison Rule" denies a defendant, who is telling the truth and knows that the key witness against him is lying, the right to a new trial on the basis of recanted testimony, because there is no possible way for him to meet the third standard of the rule. If a defendant is in fact innocent and a witness for the Government commits perjury, there is no way a defendant can obtain a new trial on the basis of recanted testimony, since he cannot show surprise. As a consequence, the man who claims a witness is lying and proclaims his innocence is estopped from having a new trial granted in the basis of recanted testimony.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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100 West Washington Street
Counsel for Petitioner

CERTIFICATE OF COUNSEL

JOHN J. FLYNN, Counsel for the Petitioner, certifies to this Court that this Petition for Rehearing is presented in good faith, and not for delay.

Counsel further certifies that this Petition is restricted to a substantial ground which was available to the petitioner, but which was not previously presented to this Court.

John J. Flynn
Counsel for Petitioner